
United States
Circuit Court of Appeals

For the Ninth Circuit.

LEROY SCHLESINGER,

Petitioner,

vs.

DAVID BURNET, Commissioner of Internal
Revenue,

Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States
Board of Tax Appeals.

No. 6182—INDEX TO TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[3] Filed Oct. 12, 1925.

United States Board of Tax Appeals.

DOCKET No. 8036.

Appeal of LeROY SCHLESINGER, Flood Building, San Francisco, Calif.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:PA:4-60D GWF406 dated September 4, 1925, and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual with his place of business in the Flood Building, San Francisco, California. He was formerly a member of the copartnership Schlesinger and Bender with its principal office at the same address.
2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer September 4, 1925.
3. The taxes in controversy are income taxes for the calendar years 1918, 1919 and 1920 and are less than \$10,000.00 to wit, \$1,413.43. Claims for abatement have been filed in respect of assessments made for the years 1918 and 1919 under Section 274 (d) of the Revenue Act of 1924. The amount of taxes in controversy for the year 1920 is \$153.08. Nothing is included in the above, however, for

any adjustment which will be rendered necessary upon the Treasury Department's acceptance of California taxpayers' returns filed on a community property basis.

4. The determination of the tax contained in the said deficiency letter is based upon the following error:

(a) Failure by the Commissioner to allow as a deduction from income in the tax returns filed by Schlesinger and Bender a loss amounting to \$13,947.42 sustained in the calendar years 1918, 1919 and 1920 due to the enactment of prohibition legislation, thus increasing the *pro rata* share of partnership income taxable to the taxpayer.

5. The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(a) In its tax return for the six months period ending December 31, 1918, the copartnership Schlesinger and Bender claimed as a deduction [4] the sum of \$21,848.60 as exhaustion, wear and tear (including obsolescence) of tangible properties. This sum consisted of the following balances:

Unamortized balance of buildings on	
leased ground account.....	\$ 7,200.00
Balance of cooperage, furniture and	
fixture account.....	13,965.03

Additional depreciation not charged on
books (details not now available).. 683.57

Total as above.....\$21,848.60

(b) In its tax return for the calendar year 1920 the copartnership of Schlesinger and Bender reported as income the sum of \$7,801.18 being the total proceeds from sales of cooperage, scrap and office furniture.

(c) The Commissioner in his letter dated October 22, 1924, file IT:PA:4 GWF-406 allowed as a deduction to Schlesinger and Bender obsolescence of goodwill amounting to \$52,814.70 apportionable between the years 1918, 1919 and 1920 as follows:

1918	12/37	\$17,129.09
1919	24/37	34,258.19
1920	1/37	1,427.42

As above \$52,814.70

(d) The deduction mentioned in paragraph 5(a) above as originally claimed by the copartnership was in error and, as in paragraph 4 above, the correct deductible amount is \$13,947.42 made up as follows:

Unamortized balance of buildings on leased ground, reverted to lessor January 16 1920.....					\$7,2
Cooperage, furniture, fixtures, etc., book value.....				\$13,965.03	

Less:

Proceeds of sales originally reported as income in the year 1920.....					\$7,801.18
Estimated value of office furniture re- tained	100.00		7,901.18	6,0	

Forward,\$13,2

[5] Forward,\$13,2

Additional depreciation not charged
on books (the details of this
item are not now available, but
the amount is reasonable be-
cause no other depreciation was
claimed)

Total					\$13,9
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The above amount should, it is believed, be apportioned in the same manner as that used by the Commissioner in apportioning the deduction for obsolescence of goodwill as in 5 (c) above, as follows:

1918	12/37	\$ 4,523.49
1919	24/37	9,046.98
1920	1/37	376.95

Total as above \$13,947.42

6. The taxpayer in support of his appeal relies upon the following propositions of law:

(a) That in computing net income there shall be allowed as deductions—

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business.

Section 214 (a) Revenue Act of 1918.

(b) That in computing net income there shall be allowed as deductions—

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

Section 214 (a) Revenue Act of 1918.

Unamortized balance of buildings on leased ground, reverted to lessor January 16 1920.....				\$7,2
Cooperage, furniture, fixtures, etc., book value.....	\$13,965.03			
<u>Less:</u>				
Proceeds of sales originally reported as income in the year 1920.....	\$7,801.18			
Estimated value of office furniture re- tained	100.00	7,901.18	6,0	
				Forward,\$13,2
				[5] Forward,\$13,2
Additional depreciation not charged on books (the details of this item are not now available, but the amount is reasonable be- cause no other depreciation was claimed)				6
Total				\$13,9

The above amount should, it is believed, be apportioned in the same manner as that used by the Commissioner in apportioning the deduction for obsolescence of goodwill as in 5 (c) above, as follows:

1918	12/37	\$ 4,523.49
1919	24/37	9,046.98
1920	1/37	376.95

Total as above \$13,947.42

6. The taxpayer in support of his appeal relies upon the following propositions of law:

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Section 214 (a) Revenue Act of 1918.

(b) That in computing net income there shall be allowed as deductions—

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

Section 214 (a) Revenue Act of 1918.

WHEREFORE the taxpayer respectfully prays that this Board may hear and determine this appeal.

W. M. SMITH,

Counsel for Taxpayer.

Address: 505 Transportation Bldg.,
Washington, D. C.

[6] TREASURY DEPARTMENT.
WASHINGTON.

Office of

Commissioner of Internal Revenue

IT:PA:4.

GWF:406

September 4, 1925.

Mr. LeRoy Schlesinger,
Room 612 Flood Building,
San Francisco, California.

Sir:

Your claim for the abatement of \$414.99 individual income tax for the year 1918 has been examined and will be rejected for the reasons stated in the attached statement.

In accordance with the provisions of Section 279(b) of the Revenue Act of 1924, you are allowed 60 days from the date of this letter within which to file an appeal to the Board of Tax Appeals contesting in whole or in part the correctness of this determination.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Com-

missioner of Internal Revenue, Washington, D. C., for the attention IT:PA:4:GWF:406. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.

By (Signed) J. G. BRIGHT,
Deputy Commissioner.

Enclosure:

Statements
Agreement—Form B.

[7] STATEMENT.

IT:PA:4.
GWF:406.

In re: Mr. LeRoy Schlesinger,
Room 612 Flood Building,
San Francisco, California.
1918.

Deficiency in Tax—\$414.99

Your claim is based on the appeal submitted by Schlesinger and Bender which was pending in the office of the Solicitor of Internal Revenue.

You are advised that in the audit of the partnership return of Schlesinger and Bender on which the adjustment of \$414.99 was based a deduction for obsolescence was disallowed for the reason that the property in question had been continued in use finally sold in 1920, and no information was furnished to substantiate the deduction claimed for

obsolescence. The partnership was given every opportunity to substantiate the deduction claimed but has failed to do so.

It is accordingly held by this office that the action taken by the Income Tax Unit in disallowing the deduction claimed should be sustained and your claim will accordingly be rejected.

[8] State of California,
City and County of San Francisco.

LeRoy Schlesinger, being duly sworn, says that he is the taxpayer mentioned in the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and these facts he believes to be true.

LeROY SCHLESINGER.

Sworn before me this 6th day of October, 1925.

[Seal] L. P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

Now, March 1, 1930, the foregoing petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[9] Filed Nov. 2, 1925. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 8036.

Appeal of LeROY SCHLESINGER, San Francisco, California.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

(1) Admits the allegations contained in paragraphs 1, 2 and 3; except that he denies that the taxes in controversy are income taxes for the years 1919 and 1920 and avers that the deficiency letter from which the appeal is taken relates only to the year 1918.

(2) Denies that any error was made in the determination of the deficiency in tax set out in the letter of September 4, 1925.

(3) Admits that in its tax return for the period ending December 31, 1918, the copartnership claimed as a deduction the sum of \$21,848.60 as exhaustion, wear and tear of tangible properties.

(4) Admits the allegations contained in subparagraphs (b) and (c) of paragraph 5.

(5) Admits that the deduction of \$21,848.60 claimed by the taxpayer in its return for the period ending December 31, 1918 was erroneous; denies

that the correct amount is \$13,947.42 and further denies that the taxpayer is entitled to any deduction on account of obsolescence of its tangible property.

(6) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

[10] PROPOSITION OF LAW.

The taxpayer is not entitled to any deduction on account of the obsolescence of its tangible property for the reason that no obsolescence was sustained.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.
Of Counsel:

M. N. FISHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing answer certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[11] Recd. Apr. 7, 1927. United States Board of Tax Appeals.

Filed Apr. 8, 1927.

United States Board of Tax Appeals.

DOCKET No. 8036.

LeROY SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED ANSWER.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits that claims for abatement have been filed in respect to assessments made for the years 1918 and 1919, but denies the remaining allegations contained in paragraph 3 of the petition; and, alleges that the taxes in controversy are income taxes for the calendar year 1918 and is in the amount of \$2,044.18.
4. (a) Denies that the Commissioner erred in

the determination of the taxes as alleged in subdivision (a) of paragraph 4 of the petition, but alleges that the Commissioner erred in not including in the petitioner's income for the year 1918, \$5,709.70 and for the year 1919, \$11,419.39, said amounts being the petitioner's distributive interest in \$52,814.70 deducted for the taxable years 1918 and 1919 by Schlesinger and Bender as obsolescence of goodwill.

5. (a) Admits that in its tax return for the period ending December 31, 1918, the copartnership claimed as a deduction the sum of \$21,848.60, as exhaustion, wear and tear of tangible properties.

5. (b) Admits the allegations contained in subdivision (b) of paragraph 5 of the petition.

[12] Docket No. 8036.

5. (c) Admits the allegations contained in subdivision (c) of paragraph 5 of the petition, and alleges that the obsolescence of goodwill amounting to \$52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not an allowable deduction to said copartnership.

5. (d) Admits that the deduction of \$21,848.60 claimed by the copartnership in its return for the period ending December 31, 1918, was erroneous. Denies that the correct amount deductible is \$13,947.42, and further denies that the copartnership is entitled to any deduction for obsolescence of its tangible property.

Denies generally and specifically each and every other allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

A. W. GREGG,
General Counsel,
Attorney for Commissioner of Internal Revenue.
Of Counsel:

THOMAS M. MATHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing Amended Answer certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.



[13] Filed at Hearing May 4, 1927. U. S. Board of Tax Appeals. Div. — Docket 8036.

United States Board of Tax Appeals.

DOCKET No. 8036.

LeROY SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDMENT TO PETITION.

Leave from United States Board of Tax Appeals, first being had and obtained the petitioner in the above entitled and numbered cause, hereby files the following amendment to the petition now on file

herein, and by way of such amendment adds to and includes in said petition the following allegation:

Petitioner further alleges by way of appeal, that all of the alleged deficiencies and taxes claimed or set forth in the said deficiency letter upon which this appeal is predicated and all alleged deficiencies and taxes claimed or set forth in the answer and amendment answer of the Commissioner of Internal Revenue herein, are forever barred by and under, the provisions of, and periods of limitations contained in, the *the* Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1919, the Revenue Act of 1920, the Revenue Act of 1921, the Revenue Act of 1924, and the Revenue Act of 1926, and particularly Section 277 of said last-named Act.

WHEREFORE, the petitioner respectfully prays that this Board may hear and determine his appeal.

JEROME H. BAYER,

Counsel for Petitioner.

State of California,
City and County of San Francisco.

LeRoy Schlesinger, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing amendment, or had the same read to him, and is familiar with the statements contained therein and that the facts stated therein are true except such facts as are stated to be upon information and belief and those facts he believes to be true.

LeROY SCHLESINGER.

Sworn to before me this 3d day of May, 1927.

[Seal] J. J. KERRIGAN,

Notary Public in and for the City and County of
San Francisco.

Now, March 1, 1930, the foregoing Amendment to
Petition certified from the record as a true copy.

[Seal] B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[27] United States Board of Tax Appeals.

DOCKET Nos. 7455 and 8036.

LeROY SCHLESINGER,

Petitioner,

vs

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opin-
ion promulgated September 25, 1928,—

IT IS ORDERED AND DECIDED that there
are deficiencies in tax in respect of the above-entitled
petitioner of \$1,529.19 for the year 1918 and \$219.68
for the year 1920.

(Signed) B. H. LITTLETON,

Member, U. S. Board of Tax Appeals.

Dated Washington, D. C.

Entered: Dec. 14, 1928.

Now, March 1, 1930, the foregoing Order of Redetermination certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[28] Filed June 11, 1929.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

LeROY SCHLESINGER,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF
THE UNITED STATES BOARD OF TAX
APPEALS.

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Now comes LeRoy Schlesinger, the above-designated petitioner and appellant, (hereinafter called petitioner) and files this petition for the review of the findings of fact and opinion of the United States Board of Tax Appeals in the appeal before said Board designated therein as Docket #8036, promulgated on the 25th day of September, 1928, and the decision and order of redetermination of said Board rendered and entered in said appeal on the 14th day of December, 1928, approving, redetermin-

ing and fixing deficiencies in income tax of the petitioner for the calendar year 1918 in the amount of \$1,529.19, and your petitioner respectfully shows:

[29] I.

STATEMENT OF THE NATURE OF THE
CONTROVERSY.

The respondent and appellee (hereinafter called respondent) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States of America.

The said petitioner and appellant (hereinafter called petitioner) made his return of Income Taxes with respect to his income for the year 1918 to the Collector of Internal Revenue at San Francisco, California, not later than March 15th, 1919.

The respondent notified petitioner by means of a sixty-day letter, of the disallowance of petitioner's abatement claim for the sum of \$414.99 covering the year 1918. This abatement claim arose primarily out of the disallowance by the Commissioner of Internal Revenue of a reduction for obsolescence of the tangible assets of the partnership of Schlesinger & Bender, of which petitioner was a member. This firm was engaged in the wholesale liquor business, with its principal place of business at San Francisco, California. The premises which it occupied were leased premises. The partnership was obliged to, and did terminate its business in January, 1920, by reason of prohibition legislation, which resulted in the obsolescence both of the tangible assets and goodwill of the partnership. A

deduction for obsolescence of goodwill was allowed to said partnership by the Commissioner of Internal Revenue. A deduction for obsolescence of tangible assets was made upon the income tax return filed by the partnership for the year 1918. This deduction was disallowed by the Commissioner, as set [30] forth in said sixty-day letter to petitioner, dated September 4, 1925. From said letter petitioner took an appeal within the time and in the manner provided by law to the United States Board of Tax Appeals. This appeal was designated in the files of said Board as Docket No. 8036. Said appeal was decided by said Board adversely to said petitioner. It is the proceedings, findings of fact, opinion, decision and order of said redetermination of said Board in that appeal which petitioner now seeks to have reviewed and reversed by this Honorable Court.

The questions considered or ruled upon by said United States Board of Tax Appeals in said appeal, as well as the questions arising out of the actions, rulings, findings of fact, opinion, decision, and order of redetermination of said Board therein, are substantially as follows:

Whether or not a form of written consent or waiver executed by a taxpayer, is effective to extend the statutory period of limitation for the assessment and/or collection of taxes, without, or before, the approval thereof by the Commissioner of Internal Revenue.

Whether or not a form of written consent or waiver executed and/or filed by a taxpayer

after the expiration of the statutory period of limitation for the assessment and/or collection of taxes, is valid and effective.

Whether or not a written consent or waiver filed with the Commissioner within the statutory period of limitations, but not approved by the Commissioner until after the expiration of said statutory period, is effective.

Whether or not the Commissioner of Internal Revenue had the right to file an amended answer in said appeal, without prior notice to said petitioner, and without prior opportunity of said petitioner to be heard with respect thereto.

Whether or not the Commissioner had the right to insert in his amended answer in said appeal, [31] new matter and matter not mentioned or referred to or incorporated in his sixty-day letter to petitioner, from which letter said appeal was taken.

Whether or not said United States Board of Tax Appeals had jurisdiction to determine alleged deficiencies additional to or greater or other than the alleged deficiency set forth in the sixty-day letter of the Commissioner to petitioner, and in nowise made a part of petitioner's said appeal, and being wholly different in nature and in the facts out of which they arise from that set forth in said sixty-day letter.

Whether or not entries in books of account of said partnership and the oral testimony of

competent witnesses introduced at the hearing of said appeal by the petitioner, were sufficient, as a matter of law, to establish the value and rates of depreciation of tangible properties of said partnership for the obsolescence of which a deduction was claimed, in the absence of any offer of evidence or proof to the contrary by the Commissioner.

Whether or not the Commissioner validly and effectively asserted at or before the hearing of said appeal a claim for deficiency other or greater than or in addition to alleged deficiency set forth in said sixty-day letter.

Whether or not obsolescence of goodwill occasioned by prohibition legislation constituted an allowable deduction.

Whether or not obsolescence of tangible assets occasioned by prohibition legislation constituted an allowable deduction, and if so, whether or not said partnership was entitled to apportion the loss resulting from said obsolescence over a period beginning with the time when it first learned that it would be obliged to discontinue its business and ending with the time when said business was actually terminated by reason of said prohibition legislation.

Whether or not petitioner was entitled to a continuance of said hearing of said appeal.

The foregoing questions were decided by said United States Board of Tax Appeals adversely to petitioner, and the position of petitioner with re-

spect thereto is covered by the assignments of error hereinafter set forth.

[32] II.

DESIGNATION OF COURT OF REVIEW.

Petitioner is and was at all times herein mentioned an inhabitant of the State of California residing in the Town of Burlingame in said State, and being aggrieved by the said decision, findings of fact, opinion and order of redetermination of said Board, desires that the same be reviewed in accordance with law by the United States Circuit Court of Appeals for the Ninth Circuit.

ASSIGNMENTS OF ERROR.

Petitioner as a basis for review, assigns the following errors which he avers occurred before and upon the hearing of said cause by the United States Board of Tax Appeals and in the decision, findings of fact and opinion of said Board therein, and in the order of redetermination rendered, given and made in said cause, and upon which errors he relies to reverse said decision and order of redetermination, to wit:

(1) The said Board erred in rendering its decision for respondent herein.

(2) The said Board erred in determining that there is a deficiency in the taxes of petitioner for the year 1918 in the amount of \$1,529.19, or in any amount or amounts at all, or any deficiency at all, and further erred in upholding respondent's rejection of petitioner's claim for abatement of \$414.99 individual income tax for 1918.

(3) The said Board erred in allowing respondent's amended answer herein to be filed without previous notice being [33] given to the petitioner herein and in granting respondent's motion for the filing of said amended answer without previous notice to petitioner of said motion or a hearing thereof.

(4) The said Board erred in refusing to strike the amended answer of respondent herein upon motion duly made by petitioner at the hearing of said cause and in denying said motion.

(5) The said Board erred in refusing, upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's amended answer an allegation in Paragraph 4a thereof, which reads as follows: "alleges that the Commissioner erred in not including in petitioner's income for the year 1918, \$5,709.70, and for the year 1919, \$11,419.39, said amounts being the petitioner's distributive interest in \$52,814.70 deducted for the taxable years 1918 and 1919 by Schlesinger & Bender as obsolescence of goodwill." The Board erred in denying said motion.

(6) The said Board erred in refusing to grant to petitioner and in denying his motion for a continuance of the hearing of said appeal.

(7) The said Board erred in refusing, upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's amended answer an allegation of Paragraph 5c which reads as follows: "and alleges that the obsolescence of goodwill amounting to \$52,814.70 de-

ducted by Schlesinger & Bender as alleged in subdivision c of Paragraph 5 of the petition is not an allowable deduction to said copartnership." The Board erred in denying said motion.

[34] (8) The said Board erred in holding that the so-called affirmative allegations contained in respondent's amended answer were properly included and might remain therein.

(9) The said Board erred in considering obsolescence of goodwill as an issue in said appeal and in ruling that it was an issue therein and in holding that obsolescence of goodwill was made an issue of and in said appeal by the pleadings therein.

(10) The said Board erred in its failure to find or hold that petitioner was entitled to claim deduction for loss occasioned by obsolescence of the furniture, equipment and leasehold improvements of the partnership of Schlesinger & Bender, of which he was a member, and to apportion this loss over the period of eighteen and one-half months beginning with 1918 when the partnership first learned that it would be obliged to terminate the business, and ending in 1920 when the business was terminated by reason of prohibition legislation.

(11) The said Board erred in its failure to find that improvements on the leasehold of the partnership of Schlesinger & Bender had a value of \$7,200.00, and that said value was entirely wiped out by complete obsolescence of said improvements upon the termination of the lease.

(12) The said Board erred in its failure to find that the value of tangible assets (exclusive of lease-

hold improvements) of the partnership of Schlesinger & Bender for which obsolescence was claimed was \$13,965.03, and that as a result of said obsolescence the value was reduced to a junk [35] value of \$7,801.18.

(13) The said Board erred in finding that no entries were made on the books of the partnership of Schlesinger & Bender of the sale in 1920 of its furniture and equipment. Said finding is wholly unsupported by and contrary to the evidence.

(14) The said Board erred in its failure to find that the proceeds received by the partnership of Schlesinger & Bender in 1920 from the sale of cooperage, scrap and office furniture was the sum of \$7,801.18. Said cooperage, scrap and office furniture being part of the property for which a deduction for obsolescence was claimed.

(15) The said Board erred in its failure to find that the partnership of Schlesinger & Bender discontinued on or about January 16th, 1920, the use of its leasehold premises.

(16) The said Board erred in its failure to find that deduction for obsolescence of goodwill in the amount of \$52,814.70 was in fact allowed to copartnership of Schlesinger & Bender by the Commissioner of Internal Revenue.

(17) The said Board erred in finding that a motion was duly granted by the Board for the filing of an amended answer in this proceeding. Said finding is wholly unsupported by and contrary to the evidence.

(18) The said Board erred in finding that at the hearing of this cause Commissioner contended for an increase of deficiency based upon the alleged affirmative allegations in the amended answer with respect to the deduction for obsolescence of goodwill. Said finding is wholly unsupported by and contrary to the evidence.

[36] (19) The said Board erred in holding that any waiver executed by petitioner for 1918 was valid and/or effectively extended the time fixed by law within which assessment could be made for that year.

(20) The said Board erred in holding that the undated income and surtax waiver of petitioner for 1918 expired March 1, 1925, and marked received September 19, 1924, effectively extended the time fixed by law within which assessments could be made for that year.

(21) The said Board erred in holding that a consent or waiver executed after statutory period of limitations has expired is valid and that taxes may be assessed within the period of such consent or waiver.

(22) The said Board erred in holding that a consent or waiver is valid and that taxes may be assessed within the period of such consent or waiver notwithstanding the fact that such waiver or consent has not been approved by the Commissioner until after the expiration of the statutory period of limitations.

(23) The said Board erred in denying the con-

tention of petitioner with respect to the issue of the statute of limitations.

(24) The said Board erred in holding that any alleged waivers or consents on behalf of said petitioner were valid and effectively extended the period fixed by law.

(25) The said Board erred in holding that the evidence was insufficient as to the value of the tangible assets on account of which obsolescence was claimed.

[37] (26) The said Board erred in holding that there was not sufficient evidence to establish how the book values of the tangible assets for which deduction for obsolescence was claimed were computed, and in holding that the method of computing said book values was necessary to be proved.

(27) The said Board erred in holding that there was no proof of costs or appropriate rates of depreciation of the tangible assets for which deduction for obsolescence was claimed.

(28) The said Board erred in its failure to hold that the amount sold or salvaged from the furniture and equipment of Schlesinger & Bender in 1920 was \$7,801.18.

(29) The said Board erred in finding and holding that it had no basis upon which to determine the amount of obsolescence either of furniture and equipment and/or leasehold improvements, and in denying petitioner's contention upon that issue. Said finding is wholly unsupported by and contrary to the evidence.

(30) The said Board erred in holding that peti-

tioner was not entitled to deduct and could not deduct anything for obsolescence of tangible assets of said partnership of Schlesinger & Bender.

(31) The said Board erred in holding that the Commissioner had erred in allowing the partnership of Schlesinger & Bender a deduction for obsolescence of goodwill.

(32) The said Board erred in holding that the Commissioner did at or before the hearing of said cause effectively or at all assert a claim for an increased deficiency or for a deficiency in excess of the amount originally determined by him.

[38] (33) The said Board erred in holding that by so-called affirmative allegations in his amended answer or otherwise or at all Commissioner had effectively asserted a claim for an increased deficiency within the meaning of Section 274E of the Internal Act of 1926, or otherwise or at all.

(34) The said Board erred in finding and holding the following statements in the amended answer constituted affirmative allegations, to wit: "that the Commissioner erred in not including in the petitioner's income for the year 1918, \$5,709.70, and for the year 1919 \$11,419.39, said amounts being the petitioner's distributive interest in \$52,814.70 deducted for the taxable years 1918 and 1919 for obsolescence of goodwill," and "that the obsolescence of goodwill amounting to \$52,814.70 * * * is not an allowable deduction to said copartnership.

(35) The said Board erred in failing to hold that the prayer in said amended answer completely

negatived the construction of said amended answer as an assertion of a claim for affirmative relief.

(36) The said Board erred in holding that obsolescence of goodwill is not an allowable deduction from gross income.

(37) The said Board erred in holding that a sufficient claim for additional deficiency or addition in tax is made if the Commissioner affirmatively alleges error in his original determination together with facts sufficient, if proved, to result in an increase of the net income and the tax of the petitioner over that originally determined by him.

[39] (38) The said Board erred in assuming jurisdiction over and in considering and determining as issues matters and items not mentioned in or made subject matter of the Commissioner's letter to petitioner and not otherwise effectively asserted at or before the hearing.

(39) The said Board erred as follows: Said Board failed and refused to allow any deduction for obsolescence of furniture and equipment of the copartnership of Schlesinger & Bender and to allow a reapportionment of this deduction over the years 1918, 1919 and 1920; and notwithstanding this fact said Board failed to allow any credit to petitioner for his distributive share of the tax paid for 1920 upon \$7,801.18, reported as a profit by the copartnership of Schlesinger & Bender in the year 1920, and representing the amount received as salvage by said copartnership of said furniture and equipment.

(40) The said Board erred in its failure and refusal to allow the abatement claim of petitioner in the sum of \$414.99 arising from respondent's refusal to allow deduction for obsolescence of the tangible assets of the Schlesinger & Bender partnership.

(41) The said Board erred in overruling the objection of counsel for petitioner to the question put to LeRoy Schlesinger and set forth on pages 58 and 59 of the transcript of the proceeding upon said appeal, and reading as follows: Q. And did they ever claim a deduction for the obsolescence of goodwill for prohibition purposes in those returns?

[40] Mr. BAYER.—I should like, at this time, to interpose an objection to all questions, relating to obsolescence of goodwill, and to save time, I ask that that same objection be preserved with respect to all questions with reference thereto.

Mr. VAN FOSSAN, Member.—The objection is overruled.”

(42) The said Board erred in making an order of redetermination and/or decision pursuant to the Board's finding of fact and opinion promulgated September 25, 1928.

(43) The said Board erred in ordering and deciding that there is any deficiency tax or sum of money due, collectible and/or assessable from or against the above-entitled petitioner for the year 1918.

(44) The said Board erred in that its decision rendered in said appeal is contrary to and against law.

(45) The said Board erred in ordering the entry of judgment under Rule 50 pursuant to the prevailing opinion of the Board rendered in said appeal.

WHEREFORE, the above-mentioned petitioner herein prays that the United States Circuit Court of Appeals for the Ninth Circuit review the action of the said United States Board of Tax Appeals in this cause and reverse said decision and order of redetermination of said Board, and direct and order the making and entry of a decision and order by said Board in favor of the petitioner determining that there is no deficiency or increased deficiency in income taxes due, collectible and/or assessable from the petitioner for the year 1918, and that [41] there is no tax or amount at all due, collectible and/or assessable from or against said petitioner for 1918, and that said petitioner be allowed his claim in abatement for 1918 in the sum of \$414.99, and that the Clerk of said Board be directed to transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of each and all of the documents necessary and material to the presentation and consideration of the foregoing petition for review and as required by the rules of said court and by law, and for such other and further relief as may to this court appear proper in the premises.

And your petitioner will ever pray.

LeROY SCHLESINGER,
Petitioner and Appellant.
JEROME H. BAYER,

Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Building,
San Francisco, California.

[42] State of California,
City and County of San Francisco,—ss.

LeRoy Schlesinger, being first duly sworn, on oath deposes and says:

That he is the petitioner and appellant above named; that he has read the foregoing petition; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and that the said petition is filed in good faith.

LeROY SCHLESINGER.

Subscribed and sworn to before me this 29th day
of May, 1929.

[Seal] LAURA E. HUGHES,
Notary Public in and for the City and County of
San Francisco, State of California.

[43] Filed Jun. 13, 1929. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 8036.

LeROY SCHLESINGER,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

NOTICE.

To: Hon. C. M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that the above-named petitioner this 8th day of June, 1929, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision, findings of fact, opinion, and order of redetermination of said Board in the above-entitled matter. A copy of said petition for review and assignments of error as filed is attached hereto.

JEROME H. BAYER,

Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Bldg.,
San Francisco, California.

I hereby this 8 day of June, 1929, accept personal service of a copy of the petition to review and assignments of error in the above-entitled matter together with notice of the filing thereof.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, for
Respondent and Appellee.

Now, March 1, 1930, the foregoing Petition for Review and proof of service certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[44] Filed Feb. 12, 1930. United States Board
of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 8036 *and*

LEROY SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION.

It is hereby stipulated and agreed by and between the parties in the above-entitled cause through their respective attorneys that the statement of evidence as approved by a member of the Board of Tax Appeals in the case of Leon L. Moise,

Docket No. 7453, is hereby incorporated by reference and the same shall constitute the statement of evidence in the above-entitled cause.

J. S. Y. IVINS,

Associate Counsel for Petitioner.

C. M. CHAREST.

F.

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing Stipulation certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 6182. United States Circuit Court of Appeals for the Ninth Circuit. LeRoy Schlesinger, Petitioner, vs. David Burnet, Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed July 1, 1930.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

in the United States Circuit Court of Appeals for
the Ninth Circuit.

Designated in U. S. B. T. A. as Docket No. 7453.)

LEON L. MOISE,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

Designated in U. S. B. T. A. as Docket No. 7454.)

GERALD F. SCHLESINGER,

Petitioner and Appellant.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

Designated in U. S. B. T. A. as Docket No. 7455.)

HEROY SCHLESINGER,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

Designated in U. S. T. A. as Docket No. 8036.)

HEROY SCHLESINGER,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

STIPULATION RE PRINTING OF RECORD.

It is hereby stipulated and agreed by and between the parties in the four above-entitled causes and their respective attorneys as follows:

That whereas, pursuant to the praecipis for the record served and filed in the above-entitled causes, copies duly certified of the following documents in and pertaining to the four above-entitled causes have, by the Clerk of the United States Board of Tax Appeals, been prepared, certified, transmitted and delivered to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

I. IN THE MATTER OF LEON L. MOISE vs.
COMMISSIONER OF INTERNAL REVENUE,
B. T. A. DOCKET No. 7453.

(a) The docket entries of all proceedings before United States Board of Tax Appeals in the above-entitled cause;

(b) All pleadings before the Board of Tax Appeals, including any exhibits attached thereto;

(c) Order for consolidation of appeals designated Docket Numbers 7453, 7454, 7455 and 8036;

(d) Findings of fact, opinion and decision of the United States Board of Tax Appeals promulgated in said cause on September 25, 1928;

(e) The order of redetermination by the United States Board of Tax Appeals in said cause;

(f) Order dated June 17, 1929, *in re* filing of amended petitions or amendments to petitions;

(g) The petition for review to United States Circuit Court of Appeals for the Ninth Circuit with

notice of filing showing service on counsel for the respondent;

(h) All orders enlarging time for preparation of the evidence and certification of the record to the United States Circuit Court of Appeals for the Ninth Circuit;

(i) Statement of the evidence;

(j) Praecipe for the record.

II. AND IN AND FOR EACH OF THE OTHER THREE OF SAID CAUSES A SUBSTANTIALLY CORRESPONDING SET OF DOCUMENTS (EXCEPT FOR CERTAIN OMISSIONS BECAUSE OF IDENTITY OR SIMILARITY.)

And whereas, a number of said documents in said four causes so prepared, certified, transmitted and delivered are either entirely or practically identical and in substance and effect the same; and,

Whereas, certain of said documents in said four causes are immaterial upon appeal,—

IT IS HEREBY STIPULATED AND AGREED that the following documents only be printed and incorporated into the printed record in and for said four causes, and that all documents in and for said four causes, save and except the following, be omitted from said printed record, and that whenever any document in and for any one of said causes is printed in said record and the corresponding documents in and for the other causes omitted from said printed record, the said document so printed shall serve as and constitute in

said printed record the corresponding document in said other causes:

(1) The docket entries of all proceedings before United States Board of Tax Appeals in Docket No. 7453, corrected, and certified as of June 11, 1930

(2) Original petitions of appeal to the United States Board of Tax Appeals, including all exhibits attached thereto in Dockets No. 7453, No. 7454, No. 7455 and No. 8036;

(3) Original Answers of Commissioner of Internal Revenue in Dockets No. 7453, No. 7454, No. 7455 and No. 8036;

(4) Motions for leave to file amended answers and the amended answers filed in Dockets No. 7453, No. 7454, No. 7455 and No. 8036;

(5) Order for consolidation of the appeals designated as Dockets No. 7453, No. 7454, No. 7455 and No. 8036, said order to be printed only once and in the form appearing in Docket No. 7453;

(6) Motions to amend petitions and amendments to petitions, or amended petitions, in Dockets No. 7453, No. 7454, No. 7455 and No. 8036;

(7) The findings of fact and opinion in and for all of said four appeals, to be printed only once and in the form appearing in Docket No. 7453;

(8) Orders of redetermination of said Board in Dockets No. 7453, No. 7454, No. 7455 and No. 8036;

(9) Petitions for review to the United States Circuit Court of Appeals for the Ninth Circuit in Dockets No. 7453, No. 7454, No. 7455 and No. 8036 showing notice of filing thereof and admission of service;

(10) Orders dated June 17, 1929, *re* filing of amended petitions or amendments to petitions in Dockets No. 7453 and No. 7454;

(11) Statement of evidence with certifications as it appears in Docket No. 7453, said statement of evidence to be printed only once;

(12) Stipulations *re* statement of evidence in Dockets No. 7454, No. 7455 and No. 8036;

(13) Praecipe for the Record in Docket No. 7453;

~~(14) Stipulations *re* correction of docket entries in Dockets No. 7453, No. 7454, No. 7455 and No. 8036;~~

(14) This stipulation.

IT IS HEREBY FURTHER STIPULATED AND AGREED that only one record shall be printed for said four causes and that said one printed record shall serve as and constitute the record in all four causes upon said four petitions for review to the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER STIPULATED AND AGREED that said four causes be consolidated as to record, briefs, hearing, disposition and decision by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: June 10, 1930.

JEROME H. BAYER,

J. S. Y. IVINS,

Attorneys for Petitioners and Appellants.

C. M. CHAREST.

F.

C. M. CHAREST,

Attorney for Respondent and Appellee.

So ordered.

FRANK H. RUDKIN,

United States Circuit Judge.

Dated: San Francisco, January 29, 1931.

[Endorsed]: Stipulation Re Printing of Record.

Filed Jul. 1, 1930. Paul P. O'Brien, Clerk.